

08-2639
MISCELLANEOUS
SIGNED 04-14-09
COMMISSIONERS: P. HENDRICKSON, R. JOHNSON, M. JOHNSON, D. DIXON
GUIDING DECISION

BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER	INITIAL HEARING ORDER
Petitioner,	Appeal No. 08-2639
v.	Account No. #####
PROCESSING DIVISION OF THE UTAH STATE TAX COMMISSION,	Tax Type: Cigarette / Tobacco License
Respondent.	Judge: Chapman

Presiding:

Kerry R. Chapman, Administrative Law Judge

Appearances:

For Petitioner: PETITIONER REP 1, Attorney
PETITIONER REP 2, Store Assistant Manager
For Respondent: RESPONDENT REP 1, Assistant Attorney General
RESPONDENT REP 2, from Processing Division

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for an Initial Hearing pursuant to the provisions of Utah Code Ann. §59-1-502.5 on January 5, 2009.

On November 21, 2008, Processing Division ("Division") issued a Notice of Cigarette / Tobacco License Suspension ("Notice") to PETITIONER. In the Notice, the Division suspended PETITIONER's "license to sell cigars, cigarettes or tobacco products . . . for a period of thirty (30) days . . . for your place of business, located at ADDRESS, CITY, Utah." The Division informed PETITIONER that it was taking this action "based on our receipt of written notification from the Salt Lake Valley Health Department that the business identified above has been found in violation of furnishing cigars, cigarettes, or tobacco to minors. . . ." The Division also informed PETITIONER that the suspension

would be in effect from January 2, 2009 through January 31, 2009.

On December 15, 2008, PETITIONER timely appealed the Division's Notice and requested a stay of enforcement for the suspension until the matter was resolved at the Commission. On December 30, 2008, the Commission granted PETITIONER's request for a stay of enforcement pending its decision in this matter becoming final.¹

PETITIONER asserts that the Commission has the authority to reduce the 30-day suspension either in part or in its entirety. PETITIONER asks the Commission reduce the suspension to 0 days for reasons explained below. The Division asks the Commission to sustain the 30-day suspension.

APPLICABLE LAW

Title 26, Chapter 42 of the Utah Code is known as "Civil Penalties for Tobacco Sales to Underage Persons." Utah Code Ann. §26-42-102 provides definitions, as follows:

As used in this chapter:

- (1) "Commission" means the Utah State Tax Commission.
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- (3) "Enforcing agency" means the state Department of Health, or any local health department enforcing the provisions of this chapter.
- (4) "Licensee" means a person licensed:
 - (a) under Section 59-14-201 to sell cigarettes at retail; or
 - (b) under Section 59-14-301 to sell tobacco products at retail.
- (5) "License to sell tobacco" or "license" means a license issued:
 - (a) under Section 59-14-201 to sell cigarettes at retail; or
 - (b) under Section 59-14-301 to sell tobacco products at retail.
- (6) "Tobacco" means cigarettes or tobacco products as defined in Section 59-14-102.

¹ The Commission believes that a stay is appropriate in cases involving the suspension or revocation of a cigarette and/or tobacco license. *See also Vance v. Fordham*, 671 P.2d 124; 1983 Utah LEXIS 1146 (Utah 1983) (where the district court and Utah Supreme Court issued a succession of stays concerning the revocation of a physician's license); *Appeal No. 87-0056* (Utah State Tax Comm'n Oct. 26, 1987) (where the Tax Commission issued an order of stay concerning the revocation of a sales tax license).

Utah Code Ann. §26-42-103 provides penalties for a licensee or employee selling tobacco to an underage person, as follows in pertinent part:

- (1) If, following an investigation or issuance of a citation or information under Section 77-39-101, an enforcing agency determines under Section 26-42-104 that a licensee or any employee has sold tobacco to a person younger than 19 years of age, as prohibited by Section 76-10-104, the enforcing agency may impose upon the licensee the following administrative penalties:
 - (a) upon the first violation, a penalty of not more than \$300;
 - (b) upon a second violation at the same retail location, and within 12 months of the first violation, a penalty of not more than \$750; and
 - (c) upon a third or subsequent violation at the same retail location and within 12 months of the first violation, a penalty of not more than \$1,000.
- (2) The enforcing agency shall notify the commission in writing of any order or order of default finding a violation of Subsection (1) which is a third or fourth violation.
- (3) The commission, upon receipt of the written notification under Subsection (2), shall take action under Section 59-14-203.5 or 59-14-301.5 against the licensee to sell tobacco:
 - (a) by suspending the licensee's license to sell tobacco at that location for not more than 30 days, upon receipt of notification of a third violation under Subsection (1)(c); and
 - (b) by revoking the license to sell tobacco at that location held by the licensee, including any license under suspension, upon receipt of notification of a fourth violation under Subsection (1)(c).

....

Utah Code Ann. §59-14-203.5 provides that the Commission shall suspend or revoke a license to sell cigarettes, as follows in pertinent part:

- (1) (a) The commission shall suspend or revoke licenses to sell tobacco, as required under Section 26-42-103 regarding suspension or revocation of a license due to the sale of cigarettes to a person younger than 19 years of age, upon receipt of notice of an enforcing agency's finding of a violation of Section 26-42-103.
- (b) The commission shall provide written notice of the suspension or revocation to the licensee.
- (2) It is the duty of the enforcing agency to advise the commission of any finding of a violation of Section 26-42-103 for which suspension or revocation of the license is a penalty.

....

Utah Code Ann. §59-14-301.5 provides that the Commission shall suspend or revoke a license to sell tobacco products, as follows:

(1) (a) The commission shall suspend or revoke licenses to sell tobacco, as required under Section 26-42-103 regarding suspension or revocation of a license due to the sale of tobacco products to a person younger than 19 years of age, upon receipt of notice of an enforcing agency's order or order of default, finding a violation of Section 26-42-103.

(b) The commission shall provide written notice of the suspension or revocation to the licensee.

(2) It is the duty of the enforcing agency to advise the commission of any order or order of default finding a violation of Section 26-42-103, for which suspension or revocation of the license is a penalty.

....

DISCUSSION

PETITIONER admits that the AREA Health Department (“Health Department”) found that it sold tobacco to minors three times within a twelve-month period in an order dated December 27, 2007. PETITIONER challenged the December 27, 2007 order, and the Health Department denied PETITIONER’s challenge in the Fall of 2008. In the December 27, 2007 order, the Hearing Officer ordered PETITIONER to pay a penalty of \$\$\$\$\$, even though the Health Department was authorized to impose “a penalty of not more than \$1,000” pursuant to Section 26-42-103(1)(c). However, the Hearing Officer made no recommendation whether the Commission should impose the full 30-day suspension or a suspension of lesser duration.

On November 5, 2008, the Health Department sent a letter to the Division, notifying the Division that it had found that PETITIONER sold tobacco to minors three times within a twelve-month period, specifically on August 1, 2006, February 6, 2007 and April 30, 2007. In this letter, the Health Department made no recommendation whether the Commission should impose the full 30-day suspension or a suspension of lesser duration.

Under these circumstances, Section 26-42-103(3) provides that the Commission shall suspend “the licensee’s license to sell tobacco at that location for **not more than 30 days**. . .” (emphasis added). At issue is whether the Commission may suspend the license for a period of less than 30 days.

PETITIONER contends that the Division’s 30-day suspension should be reduced for several reasons. First, PETITIONER points out that the violations were committed by PETITIONER employees, not by PETITIONER itself. PETITIONER asserts that these employees were criminally convicted of their crimes. For these reasons, PETITIONER contends that those portions of Utah law that impose a 30-day suspension are unconstitutional under both the Utah Constitution and the United States Constitution. The Commission, however, declines to address the constitutionality of the statutes mandating a one-year revocation. In (*X*)v. *Utah State Tax Comm’n*, 2001 UT 74 (Utah 2001), the Utah Supreme Court explained that “[i]t is not for the Tax Commission to determine questions of legality or constitutionality of legislative enactments” and that “the Tax Commission . . . lacks the authority to determine constitutional questions.” The Court further explained that once a party has exhausted its administrative remedies at the Tax Commission, it could appeal the Commission’s decision to a court with the authority to address the constitutional concerns.

Second, PETITIONER asserts that suspension of its license for 30 days is a penalty that is disproportionate to the three violations at issue. PETITIONER asserts that until the three violations at issue occurred, it had a good compliance record and that it has had no further violations since the April 30, 2007 violation that gave rise to this appeal. It also asserts that the economic impact of a 30-day violation would result in loss tobacco sales of approximately \$\$\$\$ per day (\$\$\$\$ for 30 days), with loss profits of at least \$\$\$\$ per day (\$\$\$\$ for 30 days). PETITIONER also asserts that it would lose customers if it could not sell tobacco because it is a regional tobacco center (tobacco is sold in a separate “smoke shop” located in the store at issue). For these reasons, PETITIONER contends that a

suspension, and especially one of 30 days, would result in a penalty that is unconstitutional. It asserts, however, that the Commission could “reapply” the Utah law in a constitutional manner by reducing the length of the license suspension to 0 days. As explained above, the Commission is not authorized to find that the applicable Utah law is unconstitutional and then “reapply” that law in a manner PETITIONER might consider constitutional. For these reasons, the Commission does not consider PETITIONER’s potential losses relevant to its decision.

Third, PETITIONER points out that the current law, Section 26-42-103(3), grants the Commission discretion to reduce the suspension from 30 days to a lesser number of days. Because this statute provides that the Commission, not a health department, shall suspend the license “for not more than 30 days,” PETITIONER argues the Commission, not a health department, determines the length of the suspension. It also asserts that the specific language provides that the Commission’s authority is discretionary; i.e., the Commission has discretion to suspend a license for any period of time from 0 to 30 days. PETITIONER also points out that the Commission found that it has discretion to reduce a 30-day suspension in *Appeal No. 05-0492* (Utah State Tax Comm’n Aug. 11, 2005), in which it reduced a 30-day suspension to 10 days under the specific circumstances in that case.

In this case, PETITIONER points that the third violation at issue involved an employee whose boyfriend had been fired. It also points out that a two-day hearing was held at the Health Department, at which PETITIONER explained the circumstances surrounding the violations and the training processes that all employees must go through at the store. After this hearing, the Health Department Hearing Officer found that a violation occurred. Under Section 26-42-103(1)(c), the Hearing Officer was required to impose a penalty “of not more than \$1,000.” After hearing all evidence, the Hearing Officer chose to apply the Health Department’s discretion and imposed a fine of only \$\$\$\$\$. Because a Health Department “finder of fact” has already determined that a maximum fine was

inappropriate, PETITIONER asks the Commission to use its discretion and find that a maximum suspension of 30 days is also inappropriate. PETITIONER asks the Commission to reduce the 30-day suspension, preferably to (X) days.

The Division, however, asserts that the 30-day suspension is not discretionary. It asserts that the Health Department is the fact finder and that Commission's role is simply to suspend the license upon proper notice from the Health Department. For these reasons, the Division asks the Commission to sustain the suspension for the full 30 days. The Division also submitted letters from the AREA Health Department and the Utah Association of Local Health Departments. In these letters, the departments inform the Commission that they would like to see a 30-day suspension consistently applied for entities with a third violation. The letters were undated and did not apply to any specific licensee. However, the Division proffered that it received the letters in the Summer of 2008.

In *Appeal No. 05-0492*, the Commission has already considered when it has discretion to reduce a 30-day suspension. In that case, the same Health Department at issue in this case issued an order in which it found that a licensee sold tobacco products to a minor on three occasions within a twelve-month period. Although the Health Department imposed the maximum fine of \$1,000, its order was silent on the issue of a suspension. The order did not indicate whether the health department was recommending a 30-day suspension or a suspension of lesser duration. The notice that the Health Department sent to the Commission requested "that the Licensee's license to sell tobacco or tobacco products be suspended for a period of not more than thirty (30) days. . ."

The Commission found that if the "Health Department recommended something less than thirty-days based on the evidence before it, the Commission should give the decision deference." However, because the Health Department failed to indicate that a suspension should be imposed and to make a specific finding as to the length of the suspension, the Commission found that it:

. . . must follow the statute as written. The law states the license would be suspended “for not more than 30 days.” (Utah Code Sec. 26-42-103.) The Utah Legislature could have eliminated the issue in the appeal at hand simply by stating the license would be suspended for 30 days. The fact that the Legislature chose the phrase it did can only be interpreted to mean that the suspension may be for a period of less than thirty days.

Based on the specific factors and circumstances in that case, the Commission found that the 10 days of the suspension the licensee had already served was a sufficient length of suspension.

In this matter, the Health Department’s December 27, 2008 order and its November 5, 2008 letter to the Commission did not recommend a number of days for the suspension. In accordance with *Appeal No. 05-0492*, the Commission has discretion to reduce the length of the suspension under these circumstances. In *Appeal No. 05-0492*, the Commission also pointed out that the Health Department should be the finder of fact. In that appeal, the Health Department considered the facts and chose not to reduce the \$1,000 maximum fine. In this case, however, the Health Department considered the facts and chose to impose a lesser fine, specifically \$\$\$\$ (%%% of the maximum allowed by law). From this information, the Commission finds that it would be appropriate to reduce PETITIONER’s suspension to (X) days, the same number of days it imposed in *Appeal No. 05-0492*.

DECISION AND ORDER

Based on the foregoing, the Commission orders that the 30-day suspension imposed by the Division be reduced to 10 days. It is so ordered.

This decision does not limit a party's right to a Formal Hearing. However, this Decision and Order will become the Final Decision and Order of the Commission unless any party to this case files a written request within thirty (30) days of the date of this decision to proceed to a Formal Hearing. Such a request shall be mailed to the address listed below and must include the Petitioner's name, address, and appeal number:

Appeal No. 08-2639

Utah State Tax Commission
Appeals Division
210 North 1950 West
Salt Lake City, Utah 84134

Failure to request a Formal Hearing will preclude any further appeal rights in this matter.

DATED this _____ day of _____, 2009.

Kerry R. Chapman
Administrative Law Judge

BY ORDER OF THE UTAH STATE TAX COMMISSION:

The Commission has reviewed this case and the undersigned concur in this decision.

DATED this _____ day of _____, 2009.

Pam Hendrickson
Commission Chair

R. Bruce Johnson
Commissioner

Marc B. Johnson
Commissioner

D'Arcy Dixon Pignanelli
Commissioner

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